

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as)	Case No. CIV 92-596-TUC-RCC
parent of Miriam Flores, a minor child, et)	
al.,)	
)	
Plaintiffs,)	ORDER
)	
vs.)	
)	
STATE OF ARIZONA, et al.,)	
)	
Defendants.)	
)	
)	

On March 3, 2006, the Speaker of the Arizona House of Representatives and the President of the Arizona Senate requested Leave to Report to the Court the Adoption of House Bill 2064 ("HB 2064") (Docket No. 373) and Defendant State of Arizona filed a Motion to Expedite Consideration of State's Motion for Accelerated Consideration of Legislation (Docket Nos. 374 - 375). On March 8, 2006, the Court held a telephonic status hearing and requested the parties to brief the Court on HB 2064 to determine if HB 2064 satisfied both the December 2005 Court Order and the January 2000 Judgment in this matter.

On April 3, 2006, a hearing was held and the Court took the case under advisement. The Court considered the following memorandum and supporting documents: Defendant Thomas Horne's Memorandum in Support of the Act (Docket No.

1 414); Defendant State of Arizona's Opening Brief (Docket No. 415); Plaintiff Miriam
 2 Flores' Brief Regarding Sufficiency of House Bill 2064 (Docket No. 419); Amicus
 3 Arizona School Boards Association's Brief *Amicus Curiae* Brief (Docket No. 425);
 4 Amicus House and Senate Democratic Caucuses of the Arizona Legislature's Brief
 5 (Docket No. 427); Plaintiff Miriam Flores' Brief (Docket No. 428); and Intervenor Parties
 6 Speaker of the House/President of the Senate's Brief Replying to Opening Briefs of
 7 Plaintiffs and Attorney General (Docket Nos. 422 and 434). As a result, this Court held
 8 that HB 2064 did not satisfy the January 2000 Order and Judgment ("January 2000
 9 Order") or the December 2005 Order and denied the Intervenor's Motion to Purge
 10 Contempt, Dissolve Injunctions, Declare Orders Satisfied, and Set Aside Injunctions.

11 On April 25, 2006, the Court entered an order holding that HB 2064 did not bear a
 12 rational relationship to the cost of providing ELL Programs, as required by this Court's
 13 January 2000 Order. The Court's April 2006 Order (Docket No. 448) was based on the
 14 following identified problems with the new law:

- 15 1. The Act does not comply with the Court's original Judgments and Orders.
- 16 2. On its face, the Act does not appropriately fund the ELL program.
- 17 3. The Act fails to delineate the cost of providing a viable ELL program.
- 18 4. The Act does not explain the basis for the \$77 increase for Group B weight
 19 students or how the \$432 appropriation is rationally related to the ELL
 20 program.
- 21 5. The \$432 appropriation is more than current funding, however it is less than
 22 the amount that was discredited in a "cost study" that was done more than
 23 eighteen years ago, and less than the amount that was determined by the now
 24 "discredited cost study" held two years ago.
- 25

1 6. Based on the Act, there is no way to determine if the models are indeed
2 standards for school districts and charter schools to follow.

3 7. The two-year limitation is a violation of federal law. And,

4 8. The offsets of federal funds such as Title I, IIA, III, Impact aid and
5 desegregation monies also violate federal law.

6 On July 31, 2006, the Ninth Circuit Court of Appeals reversed this Court's Orders
7 holding the Moving Defendant's in contempt and rejecting House Bill 2064 ("H.B.
8 2064") and remanded to the District Court with instructions to hold an evidentiary
9 hearing and make findings of fact regarding whether "changed circumstances" required
10 modification of the original court order pursuant to Rule 60(b)(5). The Court held an
11 eight day evidentiary hearing, beginning on January 9, 2007. The parties presented live
12 testimony and stipulated to admit into evidence most exhibits. The trial addressed only
13 one specific issue. The following issue was tried: whether funding and programmatic
14 changes that have occurred since the January 2000 Order in this case warrant a
15 modification of that judgment or otherwise bear on the appropriate remedy in this case.
16 The Court has considered all the testimony and exhibits, the briefs filed before and after
17 the hearing as well as the findings of fact and conclusions of law by all parties.

18 This Court's Order will be as brief as possible as the Court promised the parties a
19 speedy ruling so that the State Legislators could take action before its scheduled
20 adjournment if needed. It is the contention of the Superintendent and the Legislative
21 Intervenors that the Court's January 2000 Order has been satisfied. Specifically, the
22 moving Defendants state that "changed circumstances" in the Nogales Unified School
23 District ("NUSD") has satisfied the original January 2000 Order and obligates the Court
24 to at least modify or vacate that original order. The moving Defendants put forth what
25

1 they contend to be the “stellar” successes of NUSD and supposedly great strides taken by
2 the State to comply with the Court’s Order.

3 There is no doubt that NUSD is doing substantially better than it was in 2000. The
4 State’s superintendent of schools is doing better than it was in 2000 with regards to its
5 role in making sure that children receive quality education. The Arizona Department of
6 Education (“A.D.E.”) is doing much more than it was in 2000, with regard to creating
7 standards, norms and oversight for Arizona’s public schools and students with regard to
8 ELL programs. It is apparent that the A.D.E. has taken its role seriously and is
9 endeavoring to establish appropriate standards and goals for all students in Arizona. It
10 should be noted that it would be premature to make an assessment of some of these
11 changes. Indeed, many of the new standards are still evolving. Unfortunately, the
12 moving State Defendants and Legislative Interveners are not doing better as it pertains to
13 satisfying the original Court Order.

14 The strides made by NUSD have been made largely as a result of their efforts
15 alone. The State Superintendent and State Legislators sing the praises of Mr. Kelt
16 Cooper – he was called Super Cooper due to his efforts in the NUSD – and his noted
17 achievements during his tenure as Superintendent for NUSD however, he is but one
18 person and is no longer employed by NUSD. The success or failure of the children of
19 NUSD or any other School district should not depend on having a “Super Cooper” at the
20 helm. The State must establish clear rules and requirements that can be fulfilled and
21 followed, no matter who is in charge.

22 Several claims were made suggesting that NUSD is doing well, however NUSD’s
23 success is fleeting at best, particularly as it pertains to NUSD’s high school students. It is
24 great that children in elementary and middle school are doing better however, that is not
25

1 sufficient. Success must also include the high school students of NUSD. Currently, this
2 is not being accomplished.

3 All parties agree that learning English doesn't take place in a vacuum. Also, all
4 parties agree that it takes a number of resources and often more than two years to achieve
5 success in any ELL program. Plaintiffs argue that the impetus for success in NUSD was
6 greatly attributed to the raising of their ELL program costs, which were \$1,570.00 more
7 than the base level funding normally provided by the State. The moving Defendants
8 argue that the successes at NUSD qualify as "changed circumstances" and ask the Court
9 to lift its sanctions. However, NUSD's changed circumstances had little or nothing to do
10 with any help from the moving Defendants themselves.

11 By increasing the standards of accountability, the Federal No Child Left Behind
12 Act ("NCLB") has to some extent significantly changed State educators approach to
13 educating students in Arizona. In order to receive funding, NCLB requires certain
14 adequate yearly progress to be made by each public and charter school. NCLB also
15 requires States to create and accountability system of assessments so that public schools
16 can continually receive funding. NCLB also reaffirms the requirement of the State to
17 effectively educate non-English speaking students.

18 Just as the State has to consider all school districts when coming up with funds for
19 a single district like NUSD, it is impossible to limit the effects of the judgment and the
20 Court's Order to NUSD. While the Court has heard testimony regarding the cost of
21 programs other than the programs at NUSD, the Court findings are based upon the
22 evidence of what exists in NUSD except where specifically stated otherwise.

23 The parties are aware that this Court analyzed HB 2064 last spring and does so
24 again here for the purpose of determining whether or not the Court's January 2000 Order
25 has been satisfied. It should be noted that the Court finds the same problems today that it

1 saw last year, because HB 2064 is the same, the problems themselves are the same. The
2 parties are to refer back to the April 2006 Order (Docket No. 448) for the Court's
3 reasoning.

4 The Court having heard the testimony and having examined the evidence offered
5 by the parties, and having heard the arguments of counsel and being fully advised herein,
6 the Court now finds generally in favor of Plaintiffs and against Defendants, and hereby
7 makes the following special Findings of Fact and Conclusions of Law pursuant to Federal
8 Rules of Procedure, Rule 52(a) and (c) as well as Rule 60(b)(5) which constitutes the
9 decision of the Court herein:

10 **FINDINGS OF FACT**

11 To the extent these Findings of Fact are also deemed to be conclusions of law,
12 they are hereby incorporated into the Conclusions of Law that follow.

13 1. At the time of this Court's judgment in January 2000, the State funded ELL
14 instruction by adding a per-student amount (the "Group B weight") for every ELL
15 student in a school district or charter school to the amount of per-student funding
16 provided for English proficient students.

17 2. Since 2000, the State has changed its primary model of ELL instruction
18 from bilingual education to structured English immersion.

19 3. The State has also increased generally available funding for schools
20 programs, facilities, and teachers. It has also used federal grant money to provide for
21 additional, short-term assistance with reading instruction to some at-risk schools,
22 including four in the Nogales Unified School District ("NUSD").

23 4. ELL students need extra help and that costs extra money. (Tr. 1/8/07 at
24 101.) The process for funding ELL instruction in the State now and for the foreseeable
25 future, absent some further legislative enactment, is controlled by HB 2064, which
attempts to meet the requirement of the EEOA by calculating and funding the

1 “incremental costs” of ELL instruction, which are statutorily defined as “costs that are
2 associated with a Structured English Immersion program pursuant to section 15-752 or a
3 program pursuant to section 15-753 and that are in addition to the normal costs of
4 conducting programs for English proficient students.” A.R.S. § 125-756.01(L)(2).

5 5. HB 2064 adds an additional sum to the Group B weight, which, if it were
6 currently effective would raise funding per ELL student from approximately \$365 to
7 approximately \$444. (Tr. 1/17/07 at 67-68.) This additional sum will not be provided
8 unless and until this Court issues an order approving HB 2064 as a response to this
9 Court’s January 2000 judgment, which it has not done. (HB 2064 § 14.)

10 6. Beginning in the 2007-08 school year, HB 2064 institutes a system of cost-
11 based funding using instructional models to be developed by a task force. A.R.S. § 15-
12 756.01(C).

13 7. Under the new law, school districts and charter schools will choose from
14 among the approved instructional models, A.R.S. § 15-756.02, and calculate the
15 incremental cost of implementing that model in their district or school, A.R.S. § 15-
16 756.01(H).

17 8. Depending on the amount of the incremental cost of the chosen
18 instructional model, a school district or charter school may be able to request additional
19 funds to cover that cost from the Structured English Immersion (“SEI”) Fund. A.R.S.
20 § 15-756.01(I).

21 9. The amount of the allowable SEI Fund request is limited. (*Id.*) Before
22 requesting funds, districts and schools must deduct from the calculated incremental cost
23 (1) the Group B weight, (2) all federal Title III monies they receive, (3) a proportionate
24 share of the federal Title I and II A monies they receive, (4) a proportionate share of the
25 federal impact aid monies they receive, and (5) a proportionate share of their
desegregation funds. (*Id.*) Only if they still have unmet incremental costs after applying

1 all of those funding sources may they request monies from the SEI Fund, and only in that
2 limited amount.

3 10. The Plaintiffs presented evidence that the per-student incremental cost of
4 providing ELL instruction is greater than either the current Group B weight of \$365 or
5 the increased weight of \$444 that would be provided if this Court approved HB 2064,
6 both in NUSD and in other districts. (Exs. 7, 9, 10, 14; Tr. 1/18/07 at 59-60; Tr. 1/24/07
7 at 117, 131; Tr. 1/25/07 at 15-16; Tr. 1/25/07 at 148, 156.) Therefore, the SEI Fund
8 provisions of A.R.S. § 15-756.01(I) will govern the total amount of funding received by
9 NUSD and other districts and schools to educate their ELL students.

10 11. Federal funds available under the Title I, IIA, and III programs are designed
11 to provide additional educational resources for at-risk students, not to subsidize any
12 obligation the state may have to educate those students. (Tr. 1/9/07 at 12.) Grants of
13 federal funds therefore carry a restriction on "supplanting," or the substitution of federal
14 funds for the funds a state would otherwise have spent on a program in the absence of the
15 federal funds.

16 12. The amount of federal funds Arizona received or expects to receive under
17 the No Child Left Behind Act totals \$575,714,495 and \$582,931,537 for fiscal years 2006
18 and 2007, respectively. (Tr. 1/9/07 at 173 & Ex. 305.) The largest portions of these
19 funds are for Title I programs in the amounts of approximately \$289,000,000 and
20 \$295,000,000 for fiscal years 2006 and 2007, respectively. (*Id.*) The supplement not
21 supplant restriction goes to the core purpose of Title I, which is to make certain that
22 children in high poverty schools [receive] extra services. (Tr. 1/9/07 at 166.)

23 13. The State agrees, in writing, to comply with this restriction on supplanting
24 as a condition of receiving federal funds. (Ex. 300.) It also agrees to ensure that any
25 school districts to which it provides subgrants will also refrain from supplanting. (*Id.*)
To that end, the State requires districts receiving federal funds to sign an agreement that

1 they will not use federal funds to supplant state educational funds. (*See, e.g.*, Tr. 1/25/07
2 at 72-73.)

3 14. A state found to have used federal funds to supplant state educational
4 expenditures faces the prospect of being required to return the misused funds and may
5 lose future eligibility for federal funds under those programs for all students. (Tr. 1/9/07
6 at 174-75, 183.) In Arizona, the potential loss of federal funds is substantial, as the State
7 receives approximately \$600 million per year. (*Id.* at 183.)

8 15. Thomas Fagan, a 29-year veteran of the United States Department of
9 Education and an expert on Title I funding testified, referring to HB 2064, that he had
10 "never seen such a blatant violation" of supplement not supplant restrictions. (Tr. 1/9/07
11 at 162-64 & 186.)

12 16. HB 2064 also imposes a time limit on funding available to school districts
13 and charter schools for the education of their ELL students. After a student has been
14 classified as an ELL for more than two years, funding for English language instruction
15 provided to that student is cut off. A.R.S. § 15-756.04(C). The district or school will
16 continue to receive base level funding for the student, just as it receives for English
17 proficient students, but it will not receive either the ELL Group B weight or any
18 [additional monetary support] from the SEI fund to meet the incremental cost of
19 providing structured English immersion instruction to that student. *Id.*

20 17. The district or school may still receive compensatory instruction funds for
21 students who do not reach English proficiency within two years, but those funds are not
22 guaranteed or formula-based, and the statute permits compensatory instruction funds to
23 be used only for services apart from normal classroom instruction. A.R.S. § 15-
24 756.04(C), § 15-756.11(G). (*See also* Tr. 1/11/07 at 132.) Under HB 2010, the
25 predecessor to HB 2064, compensatory instruction funds could be used to improve
academic proficiency and English language proficiency. (Tr. 1/10/07 at 130-31.) HB

1 2064 limits the use of compensatory instruction funds to improving English language
2 proficiency. (*Id.*)

3 18. Because of the two-year cutoff, districts and schools will have to bear the
4 incremental costs of normal classroom instruction for ELL students who take longer than
5 two years to attain English proficiency. Alternatively, they will have to dilute their
6 remaining Group B weight funds to cover these students as well. In NUSD that would
7 effectively reduce the district's Group B weight funds from \$365 to \$182. (Tr. 1/17/07 at
8 68.)

9 19. HB 2064 also limits the availability of C.I.F. for reclassified English
10 proficient students to only the first two years after they are reclassified. A.R.S. § 15-
11 756.11(G). The use of compensatory instruction funds is limited to improving English
12 language proficiency even though reclassified students are, by definition, proficient in
13 English. (Tr. 1/11/07 at 134-35.)

14 20. No distributions have been made from the \$10,000,000 compensatory
15 instruction fund created by HB 2064. On a per ELL student basis, the fund provides \$74
16 per student. (Tr. 1/17/07 at 69-70.)

17 21. Many students may attain English language proficiency within two years,
18 but two years of ELL instruction is insufficient for many English Language Learners.

19 22. On average, it takes ELL students in the NUSD four to five years to be
20 reclassified as English proficient. (Tr. 1/18/07 at 17-18; *see also id.* at 40.) Tucson
21 Unified School District ELLs spend an average of 4.6 years in ELL programs. (Tr.
22 1/24/97 at 204.) In the Murphy Elementary School District, 86% of exited students took
23 more than two years to achieve English language proficiency. (Tr. 1/25/07 at 163-64,
24 168-70, 172-73; Ex. 16.) Proficiency within two years is the exception in the Scottsdale
25 Unified School District. (C. Rivera Depo. at 67.) And in the Glendale Union High
School District, 46% of the ELL students in Glendale High School and 15% of those at

1 Sunnyslope High School take more than two years to achieve English language
2 proficiency. (Docket Entry 614, Plaintiffs Notice of Filing Exhibit)

3 23. The Defendant-Intervenors and the Defendant Superintendent of Public
4 Instruction (collectively, the Moving Parties) did not present any evidence that two years
5 is a sufficient amount of time for all ELL students to attain English language proficiency.

6 24. The State does not currently have data as to the statewide average for how
7 long students are classified as ELLs before they exit the system. (Tr. 1/11/07 at 112.)

8 25. Those of the Moving Parties' witnesses who addressed the subject were
9 unanimous in their opinion that at least some students will not reach English language
10 proficiency in two years.

11 26. The Moving Parties' expert, Rosalie Porter, testified that achieving English
12 language proficiency takes approximately two years, but "some children will certainly
13 require more time." (Tr. 1/8/07 at 110 & 128.) She also testified that services and
14 funding for those children should not be cut off. (*Id.* at 127.)

15 27. Irene Moreno, who is in charge of the English Acquisition Services section
16 of the Arizona Department of Education testified that people "that have been in the
17 system" believe students become proficient in English "generally anywhere from two to
18 three years." (Tr. 1/10/07 3 at 11.) She also testified that the one model for ELL
19 instruction developed by her group "allows for the possibility that students are going to
20 take longer than two years." (*Id.* at 103.)

21 28. The former superintendent of NUSD, Kelt Cooper, testified that he "would
22 think that within three years a bright young person with a great deal of support could
23 probably be pretty good at a second language, but I'm comfortable with three years being
24 fairly strong." (Tr. 1/11/07 at 85.) He was not comfortable with a one or two year time
25 period. (*Id.* at 107.)

1 **CONCLUSIONS OF LAW**

2 1. To the extent any of these Conclusions of Law contain findings of fact, they
3 are hereby incorporated into the Findings of Fact above.

4 2. The [Federal] Equal Educational Opportunities Act ("EEOA") requires the
5 State "to take appropriate action to overcome language barriers that impede equal
6 participation by its students in its instructional programs." 20 U.S.C. § 1703(f).

7 3. In order to satisfy the mandate of the EEOA, the State may choose any
8 legitimate established or experimental instructional method; the Court will not interfere
9 with the State's choice from among legitimate available models of language instruction.
10 *See Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981).

11 4. Once the State has chosen an instructional method, it must provide sufficient
12 funding to implement that method. *Id.*

13 5. It is in this regard that this Court found the State's actions deficient under the
14 EEOA in its January 2000 judgment. The Court found that the State had not adequately
15 funded ELL programs in the Nogales Unified School District, as demonstrated by
16 inadequate resources available to educate ELL students in that district, and that the State
17 had failed to fund ELL programs in a manner rationally related to the cost of providing
18 the State's chosen instructional model.

19 6. While this Court's January 2000 findings of fact and conclusions of law
20 identified certain specific areas in which the NUSD ELL educational program was
21 lacking, such as classroom size and materials, mere amelioration of those specific
22 conditions is inadequate to comply with this Court's judgment and subsequent orders.
23 Rather, compliance would require a funding system that rationally relates funding
24 available to the actual costs of all elements of ELL instruction.

25 7. The Intervenor Defendants, joined on remand in this argument by the
Superintendent, contend that there has been a sufficient change in the underlying factual

1 circumstances that justifies setting aside this Court's 2000 judgment as satisfied and
2 ending judicial supervision over this case.

3 8. The movants' burden is defined by the procedural rule under which they seek
4 relief – Federal Rule of Civil Procedure 60(b)(5). That rule provides that relief from a
5 judgment may be had if “the judgment has been satisfied, released, or discharged,
6 reversed or otherwise vacated, or it is no longer equitable that the judgment should have
7 prospective application.”

8 9. Rule 60(b)(5) provides relief from final judgments where a “significant change
9 in facts or law warrants revision of the decree.” *Bellevue Manor Assocs. v. U.S.*, 165
10 F.3d 1249, 1255 (9th Cir. 1999) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S.
11 367 (1992)). There must be a showing that “it is no longer equitable that the judgment
12 should have prospective application, not when it is no longer convenient to live with [its]
13 terms.” *Rufo*, 502 U.S. at 383); *see also Agostini v. Felton*, 521 U.S. 203, 257 (1997)
14 (Ginsburg, J. dissenting) (“[R]eligitation of the legal or factual claims underlying the
15 original judgment is not permitted in a Rule 60(b) motion or an appeal therefrom.”).

16 10. To prevail on a Rule 60(b)(5) motion, the movant must “satisfy the initial
17 burden of showing a significant change either in factual conditions or in the law
18 warranting modification of the decree.” *U.S. v. Asarco, Inc.*, 430 F.3d 972, 979 (9th Cir.
19 2005) (citing *Rufo*, 502 U.S. at 384). If the movant meets that burden, it must show that
20 its proposed modification of the decree is “suitably tailored to resolve the problems
21 created by the changed factual or legal conditions.” *Id.* (citing *Rufo* at 391.)

22 11. A movant who cites significantly changed factual conditions “must
23 additionally show that the changed conditions make compliance with the consent decree
24 ‘more onerous,’ ‘unworkable,’ or ‘detrimental to the public interest.’” *Id.* (citing *Small v.*
25 *Hunt*, 98 F.3d 789, 785 (4th Cir. 1996) and *Rufo* at 384).

12. The movants in this case have attempted to demonstrate that the judgment has
been satisfied, relying both on (1) evidence about new methods and funding sources in

1 place now that did not exist in the State in 2000 and (2) HB 2064 as a funding method
 2 that satisfies the legal requirement that funding be rationally related to the actual cost of
 3 ELL programs. In such cases, the Court must evaluate whether changes in the
 4 defendants' activities are "so significant as to warrant an end of court supervision." *See*
 5 *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). While an extended period of
 6 voluntary compliance is "a factor supporting termination of an injunction . . . more is
 7 required." *S.E.C. v. Coldicutt*, 258 F.3d 939, 943 (9th Cir. 2001).

8 13. HB 2064, which currently controls ELL instructional funding violates federal
 9 law.

10 14. HB 2064 takes into consideration federal funds received under the Elementary
 11 and Secondary Education Act ("ESEA"), in violation of 20 U.S.C. § 7902. A.R.S. § 15-
 12 761.01 determines the amount of funding available to districts and schools to fund the
 13 incremental costs of educating ELL students in a calculation that depends on the amount
 14 of ESEA funds that district or school has received. This is absolutely forbidden under
 15 federal law and this Court therefore cannot approve HB 2064's funding system.

16 15. Because HB 2064 attempts to meet the State's obligation to fund ELL
 17 instruction with federal funds that cannot be so used, it does not comply with the EEOA.
 18 HB 2064 does not provide for full State funding of ELL instructional costs. Rather, it
 19 subtracts a proportionate share of the federal funds received by a district or school from
 20 the amount that that district or school will receive. A.R.S. § 15-756.01(I).

21 16. The federal laws governing use of the Title I, IIA, and III funds at issue
 22 expressly forbid the State from using those funds to "supplant," or replace, funds that the
 23 State would otherwise provide. 20 U.S.C. § 6314(a)(2)(B) (Title I funds for schoolwide
 24 programs); § 6315(b)(3) (Title I funds for targeted programs); § 6613(f) (Title IIA grants
 25 to states); § 6623(b) (Title IIA subgrants to local educational authorities); § 6825(g)
 (Title III funds). HB 2064 violates these supplement not supplant restrictions. Therefore,
 a district or school whose incremental costs exceed the Group B weight provided to all

1 schools will face the choice of violating federal laws governing the use of their federal
2 funds, thereby jeopardizing both those funds and eligibility for future federal funds, or
3 underfunding its ELL instructional programs. Neither scenario represents compliance
4 with the EEOA.

5 17. These violations of federal law jeopardize the entire stream of federal
6 educational funds available to the State's students, a sum of almost \$600 million per year.
7 Withdrawal of eligibility for those funds, or an order that the State repay them in whole
8 or part, would have serious detrimental consequences for all Arizona students, including
9 ELL students.

10 18. HB 2064 imposes an impermissible two-year limitation on funding for ELL
11 instruction, cutting off all funding for the incremental cost of ELL classroom instruction,
12 including the Group B weight. The EEOA does not permit time limits or restrict the
13 State's obligation to ELL students to two years. The evidence showed that some ELL
14 students need more than two years to become proficient in English. As a result, HB 2064
15 fails to fund each year of ELL instruction necessary to attain proficiency.

16 19. For all these reasons, the funding mechanism put in place by HB 2064 fails to
17 comply with the EEOA. HB 2064 fails to satisfy this Court's judgment because it does
18 not provide funding for ELL instruction, for all ELL students, that is rationally related to
19 the cost of that instruction. Instead, it systematically underfunds ELL instruction by
20 impermissibly considering and deducting federal funding amounts that cannot be used for
21 those purposes and by imposing a two-year limitation on the funding available for any
22 student.

23 20. Rule 60(b)(5) relief is only available under limited circumstances where the
24 moving party can establish (1) a significant change in the facts or the law warrants
25 revision of the decree, (2) changes in the defendants' activities are so significant as to
warrant an end of court supervision, (3) changed conditions make compliance with the
consent decree more onerous, unworkable, or detrimental to the public interest, and (4)

1 the moving party's proposed modification of the court's decree is suitably tailored to
2 resolve the problems created by the changed factual or legal conditions. The Moving
3 Parties failed to satisfy any of these prerequisites to Rule 60(b)(5) relief.

4 **CONCLUSION**

5 On January 24, 2000, this Court held that the State's minimum funding level for
6 ELL programs was arbitrary and capricious and bore no rational relation to the actual
7 funding needed to insure that ELL students could achieve mastery of the State's
8 academic standards. *See Flores v. State of Arizona*, 172 F. Supp. 2d 1225 (D. Ariz.
9 2000). More than 7 years later, circumstances in this regard remain the same. The
10 Moving Parties have not shown compliance with this Court's decree, much less changed
11 circumstances that would warrant modification or dissolution of this Court's order.

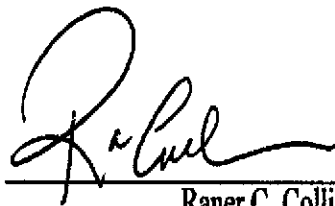
12 Accordingly,

13 **IT IS HEREBY ORDERED** that the Court finds in Favor of the Plaintiffs.

14 **FURTHER, IT IS ORDERED** that the Court finds that the moving Defendants failed to
15 satisfy the requirements pursuant to Rule 60(b)(5) for relief.

16 **FURTHER, IT IS ORDERED** that the State has until the end of the current Legislative
17 Session to comply with the Original Order.

18 Dated this 22nd day of March, 2007.

19
20
21 

22 Raner C. Collins
23 United States District Judge
24
25